91-1885

(1)

Supreme Court, U.S.
FILED
MAY 21 1992
OFFICE OF THE CLERK

No.

# In The Supreme Court

OF THE

# United States

OCTOBER TERM, 1991

PETE WILSON, in his official capacity as Governor of the State of California; BENJAMIN T. HACKER, as Director of the State Department of Veterans Affairs; STATE DEPARTMENT OF VETERANS AFFAIRS; and THE STATE OF CALIFORNIA,
*Petitioners,*

v.

CHARLES DEL MONTE, NICHOLAS DEL MONTE, ANDREW DEL MONTE, and MICHAEL GURECKAS, Individually and on Behalf of the Class They Represent; JOAN DEL MONTE, KARL SEUTHE, CLYDE MCCOWN, and JOHN RIGNEY, Individually and as Tax Payers,
*Respondents.*

**Petition for a Writ of Certiorari to the Supreme Court of the State of California**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

1. DOES CALIFORNIA'S STATUTORY REQUIREMENT OF STATE RESIDENCE AT TIME OF ENTRY INTO MILITARY SERVICE AS A CONDITION OF ELIGIBILITY FOR CERTAIN VETERANS' BENEFITS[1] VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT?

a. In declaring the requirement violative of the Equal Protection Clause, did the California Supreme Court err in concluding that it was constrained by recent decisions of the United States Supreme Court[2] to hold the requirement unconstitutional?

(1). Are *Zobel, Williams,* and *Hooper* dispositive of this case, and if not, does *Soto-Lopez* compel the result reached by the California Supreme Court?

(2). If *Zobel, Williams,* and *Hooper* are not dispositive, and if *Soto-Lopez* does compel that result, should *Soto-Lopez* be overruled as being wrong on principle or wrongly decided?

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[1] *California Military and Veterans Code* § 980(a)(1)&(2) [Cal-Vet loan benefit]; and *1987-88 California Budget Act,* Item 1960 [veterans' dependents' educational benefits].

[2] *Zobel v. Williams* (1982) 457 U.S. 55, 102 S.Ct. 2309; *Williams v. Vermont* (1985) 472 U.S. 14, 105 S.Ct. 2465; *Hooper v. Bernalillo County Assessor* (1985) 472 U.S. 612, 105 S.Ct. 2862; *Attorney General of New York v. Soto-Lopez* (1986) 476 U.S. 898, 106 S.Ct. 2317.

## PARTIES TO THE PROCEEDING

The names of all parties to the proceeding appear in the caption of the case.

As to the Petitioners (Defendants and Respondents below), the California Supreme Court substituted Governor Pete Wilson for former Governor George Deukmejian, and we have substituted Director Benjamin T. Hacker for former Director Jesse G. Ugalde.

The Respondents herein (Plaintiffs and Appellants below) are the same parties as in the proceedings below.

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**Petition for a Writ of Certiorari to the Supreme Court of the State of California**

## PETITION FOR WRIT OF CERTIORARI

## OPINIONS BELOW

The opinion of the California Supreme Court was issued on February 24, 1992, and is reported as *Del Monte v. Wilson* (1992) 1 Cal.4th 1009, 4 Cal.Rptr.2d 826, 824 P.2d 632. [Also, see Appendix (A-1-20)].

The opinion of the California Court of Appeal, Second Appellate District (Court of Appeal), was issued on May 23, 1991, and was reported as *Del Monte v. Deukmejian* (1991) 1 Cal.App.4th

1213, 230 Cal.App.3d 462, 281 Cal.Rptr. 380. [See Appendix (A-21-40)].[3]

The judgment of the Superior Court of California, County of Los Angeles, the court of first instance, was entered on March 6, 1989. Its opinion was filed on January 26, 1989. Copies of both of these documents are contained in the Appendix. [See Appendix (A-41,42 & A-43-55)].

## JURISDICTION

The final decision of the California Supreme Court was entered on February 24, 1992. There were no orders respecting a rehearing or granting an extension of time within which to file a petition for a writ of certiorari. Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(a), which provides in part as follows:

> "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . . ."

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment's Equal Protection Clause provides in part that:

> ". . . No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amend. XIV, § 1.

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[3] Review was granted by the California Supreme Court and this opinion was superseded by *Del Monte v. Deukmejian* (1991) 285 Cal.Rptr 230, 815 P.2d 303.

The California statute at issue provides in part that:

> "(a) As used in this chapter, 'veteran' means any of the following:
>
> * * *
>
> "(2) Any person who served in the active military, naval, or air service of the United States . . .; [and who] was at the time of entry into active duty a native of or bona fide resident of this state . . . ." Cal. Mil. & Vet. Code § 980(a)(2).

## STATEMENT OF THE CASE

### Summary of Material Facts

The statute at issue requires, as a condition of eligibility for a veterans' farm or home purchase loan (Cal-Vet loan),[4] that a veteran must be a native of California or must have been a bona fide resident of California at the time of entry into active military service (active duty). Cal. Mil. & Vet. Code § 980(a)(1)&(2). The term "entry into active duty" has long been construed by the State as including not only the original entry but also any subsequent re-enlistment or re-entry. 56 Ops.Cal.Atty.Gen. 294.

The Cal-Vet loan program is 71 years old. The statute at issue was first enacted as part of the Veterans' Welfare Act of 1921, was reenacted as part of the Veterans' Farm and Home Purchase Act of 1943, and enacted again as part of the Veterans' Farm and Home Purchase Act of 1974. Since 1943, the people of the State of California, in 20 separate ballot measures, have authorized the sale of over $7.4 billion of veterans' general obligation bonds to provide funds for the program. Veterans' Bond Acts of 1943-1990, Mil. & Vet. Code §§ 990-998.112. Since 1970, the State Legislature has authorized the sale of over $1.5 billion of veterans' revenue bonds to supplement the general obligation bond funding. Mil. & Vet. Code 1000.1-1001.9.

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[4] The Cal-Vet loan program provides for direct farm and home loans to eligible veterans, with a $200,000 maximum for a farm and a $125,000 maximum for a home. Cal. Mil. & Vet. Code § 987.65.

However, since the enactment of the federal Mortgage Subsidy Bond Tax Act of 1980, Congress has enacted ever-increasing restrictions on the uses of tax-exempt housing bonds, including state ceilings or volume caps. 26 U.S.C.A. § 143(1)(3) & 146(d).[5] These restrictions have limited the State's ability to fund its housing programs adequately, including the CalVet loan program. The decision of the California Supreme Court extends the benefits to the excluded class (Appendix A-19), and would increase the number of eligible veterans to such an extent that the State would be unable to meet even a small part of the demand.[6]

The Budget Act provision at issue annually appropriates funds to the California Department of Veterans Affairs for the veterans' dependents' educational assistance program.[7] Cal. Mil. & Vet. Code §§ 890-899. Since the 1978-79 fiscal year, control language in the appropriation has prohibited the Department from spending the appropriated funds for educational assistance to dependents of non-California veterans.

A "non-California veteran" is defined as a "person not meeting the requirements of Section 980" of the Code. 1987-88 Cal. Budget Act, Item 1960. For this reason, the challenge to the Budget Act provision is based upon and follows as a normal result of the challenge to Section 980 of the Code, and is an integral part thereof.

Respondent Charles Del Monte is a disabled non-California veteran. His sons, Respondents Nicholas and Andrew Del Monte,

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[5] For example, California's annual ceiling for its general obligation veterans' bonds is $340 million.

[6] Although the exact number is not known, Respondents estimated below that the number of "non-California" veterans now residing in California was, at a minimum, 6[illegible]5,500. With the present Cal-Vet loan maximum of $125,000, only 2,720 loans in that amount can be made from the annual ceiling of $340 million.

[7] The veterans' dependents' educational assistance program provides for payments of small monthly high school and college stipends ($50 and $100) to dependents of deceased or disabled veterans. Cal. Mil. & Vet. Code § 894.

applied for dependents' educational assistance for a period of several years (1983-1987). Except for a brief period in 1986 and 1987 when the benefits were granted and paid in error, their applications were denied on the ground that their father was a non-California veteran.

Respondent Michael Gureckas is a non-California veteran who sought information about a Cal-Vet loan in 1971, and was told that he did not qualify because he was not a California resident when he entered or re-entered the service. Respondent Joan Del Monte is the spouse of Respondent Charles Del Monte, and bases her challenge on her status as a taxpayer. Respondents Karl Seuthe, Clyde McCown, and John Rigney are non-California veterans who came to reside in California some time after their active military service, but never applied for any California veterans' benefits. Their challenge is also based on their status as taxpayers.

**Procedural History**

The underlying action by Respondents was a petition for writ of mandate and complaint for declaratory and injunctive relief, challenging on equal protection grounds (and other grounds not pertinent here) the constitutionality of these statutory and budgetary provisions.

Respondents filed their original petition and complaint on May 6, 1988, in the Superior Court of California, County of Los Angeles (Trial Court).

A first amended petition was filed on May 17, 1988, as a matter of course or right. After certain law and motion proceedings[8] which are not pertinent here, a second amended petition, superseding the earlier pleadings, was filed on August 1, 1988, with leave of court.

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[8] The action was filed as a class action, and among the motions made was a motion to certify certain classes and sub-classes, but in view of the trial court's disposition, no ruling was made on the motion and a class was not certified.

The State (Petitioners herein) filed its answer to the second amended petition on August 11, 1988.

The federal question sought to be reviewed here was raised by Respondents in the Trial Court in their second amended petition, on the first page of which they alleged as follows:

> "1. Under California law, veterans residing in the state may qualify for a number of state benefits for themselves and their family members. At issue in this lawsuit are those benefits for which the legislature has conditioned eligibility on the veteran's having been a California resident at the time of entry in the service. ('Cal-Vets')... . The respondents consistently apply these eligibility restrictions, despite the fact that the United States Supreme Court has ruled that such residency requirements are unconstitutional. *Hooper v. Bernalillo County Assessor,* 472 U.S. 612, 86 L.Ed.2d 437, 105 S.Ct. 2862 (1985); *Zobel v. Williams,* 457 U.S. 55, 72 L.Ed. 672, 102 S.Ct. 2309 (1982); *Attorney General of New York v. Soto-Lopez,* 106 S.Ct. 2317 (1986)...."

The action sought a peremptory writ of mandate ordering the State to grant veterans' benefits and veterans' property tax exemptions[9] without regard to the residency requirements; and a declaratory judgment that Item 1960 of the Annual Budget Act was unconstitutional under the federal Constitution and that it violated the single-subject rule of the California Constitution.

The action also sought a declaratory judgment that the State's alleged practice of summarily denying and terminating veterans' benefits violated the due process clauses of the federal Constitution and the California Constitution; and injunctions enjoining the State from applying or enforcing the residency requirements.

Trial was had and on March 6, 1989, the Trial Court rendered its judgment denying the petition for peremptory writ of mandate;

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[9] The residency requirement for the veterans' property tax exemption was contained in the California Constitution. Respondents later withdrew their challenge to this residency requirement because of the passage in California of Proposition 93, which eliminated the requirement.

declaring that Section 980 of the Military and Veterans Code and Item 1960 of the Budget Act were not unconstitutional; that Item 1960 did not violate the single-subject rule;[10] that the State did not have a current policy and practice of summarily denying and terminating benefits, and that the State's current appeal procedures did not violate the due process clause;[11] (Appendix A-41,42).

The Trial Court had announced and explained its decision in open court on December 7, 1988, and that opinion, entitled "Statement of Intended Decision," was filed on January 26, 1989. (Appendix A-43-55).

On the federal question sought to be reviewed here, the Trial Court held as follows:

> "This Court holds, for the reasons given, that the California Home Purchase and Educational Benefit provisions of the California Veterans Law do not violate the equal protection or privileges and immunities clauses of the Federal Constitution or interfere with, deter, or penalize plaintiff's right to travel; and, accordingly, denies plaintiff's petition and the remedies sought therein." (Appendix A-52).

Appeal from the judgment of the Trial Court was taken by Respondents to the California Court of Appeal, Second Appellate District (Court of Appeal).

The federal question sought to be reviewed here was raised by Respondents in the Court of Appeal at the beginning of their opening brief, wherein on the first page thereof they asserted the question as follows:

> "Appellants appeal from the Superior Court's denial of their Petition/Complaint which challenged: (1) the constitutionality of sections 980 (a) . . . and Item 1960 of the Annual Budget Act, which condition eligibility for statutory

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[10] This was a State constitutional issue which is not an issue here.

[11] The State did not seek review by the California Supreme Court of the later decision of the Court of Appeal reversing the Trial Court on these issues, and they are not at issue here.

veterans' benefits upon the veterans' residency in California at the time of entry into active duty. . . .

"The United States Supreme Court has unequivocally ruled that the type of residency requirement which is at issue in this lawsuit violates veterans' rights to equal protection. . . ."

On May 23, 1991,[12] the Court of Appeal filed its decision reversing the judgment and remanding the cause to the Trial Court "with instructions to issue the peremptory writ of mandate and for proceedings consistent with this opinion." *Del Monte vs. Deukmejian* (1991) 230 Cal.App.3d 462, 478-479, 281 Cal. Rptr. 380.

In its opinion, the Court of Appeal held as follows:

"Bound by the doctrine of stare decisis and U.S. Supreme Court interpretations of the constitutionality of similar benefit programs in *Zobel, Soto-Lopez* and *Hooper,* we find California's plan of preferring established California resident veterans over otherwise bona fide resident veterans of California violative of the equal protection clause of the federal Constitution." 230 Cal.App.3d 462, 464. (Appendix A-22).

On July 2, 1991, the State filed its petition for review of the Court of Appeal decision with the California Supreme Court. On August 22, 1991, the California Supreme Court issued its order granting review. *Del Monte v. Deukmejian* (1991) 285 Cal.Rptr. 230, 815 P.2d 303.

The federal question sought to be reviewed here was raised by the State before the California Supreme Court in its petition for review and in its brief on the merits, wherein the question was stated as follows:

"1. DOES CALIFORNIA'S STATUTORY REQUIREMENT OF STATE RESIDENCE AT TIME OF ENTRY INTO ACTIVE MILITARY SERVICE AS A

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[12] The long delay between the Trial Court's judgment and the decision of the Court of Appeal was caused in large part by difficulties in procuring the trial record due to inability to locate the court reporter.

CONDITION OF ELIGIBILITY FOR A CAL-VET LOAN VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION?

On February 24, 1992, the California Supreme Court filed its decision affirming the Court of Appeal decision and remanding the cause to the Court of Appeal "with directions to remand the cause to the superior court for further proceedings not inconsistent with this opinion." *Del Monte v. Wilson* (1992) 1 Cal.4th 1009, 4 Cal.Rptr.2d 826, 837, 824 P.2d 632, 643. (Appendix A-19).

In its opinion, the California Supreme Court held as follows:

> "We are to decide whether the distribution of veterans benefits conditioned on California residency at a fixed point in the past violates the federal constitutional right to equal protection of the laws. We conclude that we are constrained by recent decisions of the United States Supreme Court to hold the statutes providing for such a distribution are unconstitutional." 4 Cal.Rptr.2d 426, 426. (Appendix A-1).

On this procedural record showing the manner or method in which the federal question sought to be reviewed was raised and how it was passed upon, Petitioners believe that the question was timely and properly raised and decided at every stage in the proceedings below, and that this Court has jurisdiction to review it on a writ of certiorari.

## REASONS FOR ALLOWANCE OF THE WRIT

As shown above, the California Supreme Court has held that California's veterans' benefit residency statute is unconstitutional on the ground that it is repugnant to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and this Court has jurisdiction under 28 U.S.C. § 1257(a).

This Court's rules provide in part that one of the kinds of reasons to be considered in exercising its discretion for review on writ of certiorari is " when a state court . . . has decided an important question of federal law which has not been, but should be settled, by this Court." U.S. Sup. Ct. Rule 10.1.(c).

As will be shown below, Petitioners believe that the constitutionality of this longstanding California statute is an important question of federal law which should be, but has not been, settled definitively by this Court.

However, Petitioners are also mindful that the standards set forth in Rule 10 for granting review on writ of certiorari, while intended as specific examples of the "special and important" reasons for which review will be granted, are expressly declared to be "neither controlling nor fully measuring" of the Court's discretion to grant review.

We believe that there is another important reason for exercising that discretion to grant review in this case.

The question presented for review involves a matter of great public importance which calls for the exercise of this Court's supervisory powers over the development of federal constitutional law.

Over the last 20 years or so, beginning with *Shapiro* in 1969 and continuing up to and including *Soto-Lopez*[13] in 1986, we have witnessed a gradual judicial erosion of ever narrowly drawn residency requirements established by the states as conditions of eligibility for a variety of ever less "significant" state benefits.

The causes of this erosion have ranged from periodic but heavy downpours of "right-to-travel," "heightened scrutiny," and "compelling state interest" analyses, to slow but steady drizzles of "legitimate state interest" and "rational basis" tests.

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[13] *Shapiro v. Thompson* (1969) 394 U.S. 618, 89 S.Ct. 1322 [welfare]; *Memorial Hosp. v. Maricopa County* (1974) 415 U.S. 250, 94 S.Ct. 1076 [nonemergency medical care]; *Zobel v. Williams* (1982) 457 U.S. 55, 102 S.Ct. 2309 [distribution of windfall oil revenues]; *Williams v. Vermont* (1985) 472 U.S. 14, 105 S.Ct. 2465 [exemption from use tax on cars purchased out of state]; *Hooper v. Bernalillo County Assessor* (1985) 472 U.S. 612, 105 S.Ct. 2862 [veterans property tax exemption]; *Attorney General of New York v. Soto-Lopez* (1986) 476 U.S. 98, 106 S.Ct. 2317 [veterans' preference on civil service examinations].

Inexorably, this trend has impaired the states' abilities to establish, administer, and maintain their social and economic programs, and to exercise the discretion necessary to determine how to allocate their scarce resources.

Strong dissents have been registered in many of the cases establishing this trend, as well as separate opinions concurring on other grounds, and the decisions have been criticized severely in some cases.

These cases began by striking down durational residency requirements for "fundamental benefits," moved from there to striking down so-called "fixed-point" residency requirements for less "significant" benefits, and then moved even further to striking down a residency requirement which was neither durational nor fixed at one particular point in time, for an even less "significant" benefit.

All these factors have resulted in uncertainties as to what the holdings really stand for in these cases, as well as in how to go about an equal protection analysis.

Petitioners believe that the time has come to consider building a retaining wall to halt the erosion, to clarify the uncertainties, to reexamine the trend carefully and to determine whether the development of federal constitutional law in this important equal protection area is heading in the right direction, and to determine whether there has been an undesirable or unnecessary departure from traditional equal protection standards.

We believe that this case presents a good and proper opportunity to do just that.

We do not suggest that this reexamination need go all the way back to *Shapiro*, nor even necessarily to *Zobel* and *Hooper*, for we recognize that rights and interests founded upon that line of decisions probably should remain undisturbed. However, for the reasons stated below, we do suggest that it may and should begin quite effectively and properly at *Soto-Lopez*.

**1. The question of the constitutionality of state veterans' "residence at time of entry" requirements should be, but has not been, settled definitively by this Court.**

As shown above, both the California Court of Appeal and the California Supreme Court held that they were bound by recent decisions of this Court to find the California statute unconstitutional as being violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

In its holding, the Court of Appeal declared that it was bound by the doctrine of stare decisis and the interpretations of this Court of the constitutionality of "similar benefit programs," and specifically referred to *Zobel, Hooper, and Soto-Lopez*. (Appendix A-22).

The California Supreme Court declared that it was constrained by "recent decisions" of this Court to hold the statutes unconstitutional (Appendix A-1), and specifically identified these decisions as *Zobel*(Appendix A-5), *Hooper* (Appendix A-7), *Williams* (Appendix A-8), and *Soto-Lopez* (Appendix A-9).

**a. The Zobel Case.**

In *Zobel*, this Court struck down a 1980 Alaska statute providing for annual distribution of a portion of the state's windfall oil revenues to its citizens.

The statute set an initial value of $50 for a "dividend unit," and provided that each adult resident would receive one dividend unit for each year of residency after 1959, the year of statehood.

(Then) Chief Justice Burger, delivering the opinion of the Court, applied the minimum rationality test and found that the statute violated the guarantees of the Equal Protection Clause. *Zobel*, 457 U.S. 55, 65.

However, Justice Brennan, joined by Justice Marshall, Justice Blackmun, and Justice Powell, delivered a concurring opinion which appears to apply "intensified scrutiny" and to find the statute unconstitutional as violative of the right to migrate. *Zobel*, 457 U.S. 55, 66-67. Justice O'Connor filed a concurring opinion

which finds the statute unconstitutional as violative of the Privileges and Immunities Clause. *Zobel*, 457 U.S. 55, 78.

(Then) Justice Rehnquist was the lone dissenter in this case. He criticized the majority for not giving the usual deference to state economic regulations, *Zobel*, 457 U.S. 55, 82, and concluded that the statute passed both equal protection and privileges and immunities muster. *Zobel*, 457 U.S. 55, 83-84.

Here, it appears that the Court treated the statute as imposing a durational residency requirement, for it created distinctions among residents "... based on how long they have been in the state." *Zobel*, 457 U.S. 55, 58.

**b. The Hooper Case.**

In *Hooper*, this Court struck down a 1981 New Mexico statute providing annual property tax exemptions for Vietnam veterans who had resided in the state before May 8, 1975 (later amended to May 8, 1976).

(Then) Chief Justice Burger, delivering the opinion of the Court, applied the minimum rationality test and found that the statute violated the guarantees of the Equal Protection Clause. *Hooper*, 472 U.S. 612, 624.

Significantly, however, in this opinion, the Court specifically observed that veterans' benefit statutes which condition eligibility on state residence at the time of induction into the military had survived equal protection challenges long before *Zobel*, and not only expressly reserved the question of the constitutionality of this kind of statute, *Hooper*, 472 U.S. 612, 621 n11, but also based its finding of irrationality in part upon the fact that the New Mexico statute was not "... written to require any connection between the veteran's prior residence and military service." *Hooper*, 472 U.S. 612, 622.

Justice Powell took no part in the decision of the case, and Justice Brennan filed a brief concurring opinion which incorporated his concurring opinion in *Zobel*. *Hooper* 472 U.S. 612, 624.

Justice Stevens, joined by (then) Justice Rehnquist and Justice O'Connor, dissented.

The dissent demonstrated that the New Mexico statute at issue in *Hooper* was quite different from the Alaska statute in *Zobel*, criticized the Court's entire analysis as being defective in several respects, and concluded that there was no substance to the claim that the New Mexico statute violated the principles of equality embodied in the Equal Protection Clause. *Hooper*, 472 U.S. 612, 633.

Here, it appears that the Court treated the statute as imposing a single "fixed-point" residency requirement, for it involved " . . . a distinction between residents based on when they first established residence in the State." *Hooper*, 472 U.S. 612, 618 n6.

**c. The Williams Case.**

The California Supreme Court characterized the Williams case as one in which this Court "invalidated a Vermont use tax exemption on out-of-state purchases of cars." *Del Monte*, 4 Cal.Rptr.2d 826, 831. (Appendix A-8). However, as shown below, the actual holding was much narrower.

Vermont collected a use tax when cars were registered, but the tax was not imposed if the car was purchased in Vermont and a sales tax had been paid.

If the car was purchased in another state, the tax was reduced by the amount of any sales or use tax paid in that state if that state had a reciprocal arrangement with Vermont, but this credit was available only to a registrant who was a Vermont resident at the time the out-of-state tax was paid.

Justice White, delivering the opinion of the Court, declared that no legitimate purpose could be perceived which was furthered by the exemption, and appeared to hold that the statute violated the Equal Protection Clause. *Williams*, 472 U.S. 14, 23, 27.

However, the action below had been dismissed on the pleadings (for failure to state a claim) before an answer was filed, and the Court, characterizing its holding as "quite narrow" and conceding that upon trial it might turn out that the statute did not operate in a discriminatory fashion, actually held only that when the statute

was viewed on its face, the appellants had stated a claim of "unconstitutional discrimination." *Williams*, 472 U.S. 14, 27, 28.

Once again, Justice Powell took no part in the decision of the case, and Justice Brennan filed a brief concurring opinion incorporating his concurring opinion in *Zobel*. *Williams*, 472 U.S. 14, 28.

Justice Blackmun, joined by (then) Justice Rehnquist and Justice O'Connor, dissented.

The dissent criticized the Court's opinion severely for imagining a "fanciful hypothetical discrimination," *Williams*, 472 U.S. 14, 29, for subjecting the Vermont statute "to a kind of microscopic scrutiny that few enactments could survive," Williams, 472 U.S. 14, 31, for making a "noncase . . . seemingly attractive by high-sounding suggestions of inequality," *Williams*, 472 U.S. 14, 36, and concluded that the statute was "manifestly rational." *Williams*, 472 U.S. 14, 37.

It is not clear how the Court regarded this residency requirement, but it does not appear to be either a durational or a single "fixed-point" requirement. In any case, because of its narrow holding, it is simply not applicable here.

**d. The Soto-Lopez Case.**

Finally, we come to the *Soto-Lopez* case, in which this Court struck down a New York statute granting veterans' preference points in civil service examinations to veterans who were residents of New York when they entered military service.[14]

In *Soto-Lopez*, no opinion of the Court was delivered. Rather, Justice Brennan announced the judgment of the Court and delivered a plurality opinion.

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[14] The same statute came before this Court in 1974 and was upheld against the same constitutional challenges, *August v. Bronstein*, 369 F.Supp. 190 (S.D.N.Y.), summarily affirmed by 417 U.S. 901, 94 S.Ct. 2596, but *Soto-Lopez* was the first (and so far, the only) time the Court has considered the constitutionality of this kind of residency requirement, other than summarily.

Justice Brennan, joined by Justice Marshall, Justice Blackmun, and Justice Powell, immediately concluded that the statute implicated the right to migrate or "right to travel," subjected it to "heightened scrutiny," and concluded that New York had not met its burden of proving a "compelling state interest." *Soto-Lopez*, 476 U.S. 898, 911.

(Then) Chief Justice Burger delivered an opinion concurring in the judgment, but expressly rejecting the plurality's "right to travel" analysis and concluding instead that the statute failed under a "rational basis" test. *Soto-Lopez*, 476 U.S. 898, 913. Justice Burger also criticized the plurality for departing from the traditional approach to equal protection analysis by addressing the "right to migrate" and applying "heightened scrutiny" without first determining whether the statute would survive "rational basis" analysis. *Soto-Lopez*, 476 U.S. 898, 912.

Justice White filed a brief opinion concurring in the judgment, but expressly rejecting the plurality's conclusion that the statute implicated the right to travel, and agreeing with (then) Chief Justice Burger that the classification was "irrational." *Soto-Lopez*, 476 U.S. 898, 916.

Justice O'Connor, joined by (then) Justice Rehnquist and Justice Stevens, filed a strong, well-reasoned dissent concluding that the statute did not violate the Equal Protection Clause, that it did not violate the "right to migrate," and that it did not violate the Privileges and Immunities Clause. *Soto-Lopez*, 476 U.S. 898, 918.

As did Justice Burger, Justice O'Connor criticized the plurality for departing from the traditional approach to equal protection analysis, and observed quite correctly that the plurality did not "... make clear how much of its analysis is necessary or sufficient to find a violation of the "right to migrate" independently of an Equal Protection Clause violation." *Soto-Lopez*, 476 U.S. 898, 919.

Justice Stevens also filed a separate dissent explaining cogently why *Hooper* did not require the Court to find the New York statute unconstitutional, observing (as pointed out above) that the *Hooper* Court was careful to reserve the question of this kind

of residency requirement, and criticizing the Court for leaving the question open in *Hooper* and then asserting in *Soto-Lopez* that *Hooper* had resolved it. *Soto-Lopez*, 476 U.S. 898, 917-918.

Thus, in *Soto-Lopez*, we have a decision of a divided Court. Only four justices declared the statute unconstitutional on "right-to-travel" grounds. Two justices expressly rejected the "right-to-travel" implication but declared it unconstitutional on equal protection grounds.

Three justices said that the statute passed muster under "rational basis" analysis and did not implicate the "right to travel" sufficiently, if at all, to trigger "heightened scrutiny." In addition, we have at least four justices[15] criticizing the plurality of four for departing from the traditional approach to equal protection analyses, as well as one justice directly criticizing them for " . . . marching in the wrong direction." *Soto-Lopez*, 476 U.S. 898, 918.

In discussing the effect of the divided decision in *Soto-Lopez* on the instant case, the California Supreme Court relied on *Marks v. United States* (1977) 430 U.S. 188, 97 S.Ct. 990, and seemed to conclude that it was bound by *Marks* because six justices in *Soto-Lopez* "clearly held the New York law . . . was unconstitutional." (Appendix A-35). In *Marks*, this Court discussed the effects of its divided decisions, and said:

> "When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the case may be viewed as that position taken by those members who concurred in the judgment on the narrowest possible grounds." *Marks*, 430 U.S. 188, 193, citing *Gregg v. Georgia* (1976) 428 U.S. 153, 169 n15, 96 S.Ct. 2909.

In *Gregg*, this Court held for the first time that the "punishment of death does not invariably violate the Constitution." *Gregg*, 428 U.S. 153, 169. The Court observed that this question was confronted squarely for the first time in *Furman v. Georgia*

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[15] Although Justice White did not explicitly criticize the plurality for departing from the traditional approach, he did disagree with them on the "right-to-travel" implication.

(1972) 408 U.S. 238, 92 S.Ct. 2726 but was not resolved because four justices would have held that capital punishment was not unconstitutional per se, two justices would have reached the opposite conclusion, and three justices, while agreeing that the statutes then before the Court were invalid as applied, left open the question whether capital punishment may ever be applied. The Court observed further that although five justices wrote separately in support of the judgment in *Furman*, all five agreed that where discretion is afforded a sentencing body as to capital punishment, that discretion must be suitably directed and limited. *Gregg*, 428 U.S. 153, 188 n36, 189.

This kind of "narrowest possible ground" is simply not evident in *Soto-Lopez*. The Respondents in the instant case argued below (and the California Supreme Court apparently agreed) that the four justices who subscribed to the plurality opinion in *Soto-Lopez* would have agreed with (then) Chief Justice Burger and Justice White that the New York statute would not survive even a "minimum rationality" analysis. In fact, however, the four justices did not so agree, for if they had, why then did they subject the statute to the stricter "heightened scrutiny" standard without first applying the more lenient "minimum rationality" standard?

What, then, was the "narrowest possible ground" upon which the six members in *Soto-Lopez* concurred? It cannot be simply that the statute was "unconstitutional," for that would be far too broad a ground for a meaningful holding.

Could it be that the statute was violative of equal protection? Possibly, but the plurality based its conclusion solely upon its "right-to-travel" analysis and, as Justice O'Connor pointed out, seemed to regard that as an independent ground, or at least did not make it clear whether it was independent of an equal protection ground. Furthermore, the plurality applied an entirely different standard in reaching its conclusion than that applied by the two concurring justices.

Again, it is not clear how the Court regarded this residency residency, but it *is* clear that it is neither durational nor based upon a single fixed point in time.

**e. Summary.**

Unlike the statutes in *Zobel* and *Hooper*, California's statute is longstanding, having been enacted over 70 years ago, and it does not establish either a durational or a single "fixed-point" residency requirement. Rather, like the New York statute, it establishes a residency requirement based upon each individual veteran's entry into active duty and, as shown above, "entry into active duty" includes not only the original entry but also later entries or re-enlistments.

Therefore, there is no requirement for residence of a specific duration; the time established for residence varies from veteran to veteran; and a veteran may enter originally from another state, move or be transferred to California, establish residence in California, re-enter or re-enlist, and qualify fully for the benefit.

Furthermore, unlike the statute in *Hooper*, California's statute is written precisely to require a connection between prior residence and military service.

In summary, the question presented for review was not settled by *Zobel*, *Williams*, and *Hooper* because the circumstances and statutes in those cases are clearly distinguishable from those of the present case, because *Hooper* expressly reserved the question, and because the very nature of the decisions in those cases leaves the question unsettled. The question was not settled by *Soto-Lopez* because no single rationale explaining the result was agreed upon by a majority of the justices and, at best, the holding in that case is unclear.

**2. The question presented for review involves a matter of great public importance which calls for the exercise of this Court's supervisory powers over the development of federal constitutional law.**

California is not the only state with a veterans' home loan program. Alaska, Mississippi, Oregon, Texas, and Wisconsin also have similar veterans' loan programs with similar residence re-

quirements.[16] Almost all the states have some kind of veterans' benefit program, and most such programs have some kind of residence requirement.

The states also have other economic and social policies and programs with varying types of residence requirements. Prior to *Zobel*, this Court had readily upheld some of those requirements. For example, as Justice O'Connor pointed out in her dissent in *Soto-Lopez*, the Court has summarily upheld residence requirements for state college tuition rates, for scholarship assistance, and for dissolution of marriage. *Soto-Lopez*, 476 U.S. 898, 923.

Yet, as indicated above, the line of cases beginning with *Shapiro* and ending with *Soto-Lopez* (n13) has resulted in a trend toward the striking down of ever narrowly drawn residency requirements, for a broad variety of ever less "fundamental" or "significant" state benefits.

And, these cases have been decided with a confusing mixture of "right to travel" and equal protection opinions, which seem to be moving steadly away from the Court's traditional approach to equal protection analyses, as well as from its traditional deference to states' regulation of their own social and economic programs,[17] but for which critical and separate concurring opinions and dissenting opinions have been abundant.

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[16] *Alaska Stats.* Sec. 26.15.130; *Miss. Stats.* Sec. 35-7-5; *Or. Const.* Art. 11(a), Sec. 3; *Tx. Nat. Res. Code* Sec. 162.001; and *Wi. Stats. 45.71.*

[17] Petitioners are aware of the general rule that in cases where there is a clash between the Fourteenth Amendment and the Tenth Amendment, the Tenth Amendment must yield. See, e.g., *Hunter v. Underwood* (1985) 471 U.S. 222, 104 S.Ct. 1916. However, Petitioners do not agree with the view of some that the Tenth Amendment "states but a truism." See, e.g., *United States v. Darby* (1941) 312 U.S. 100, 61 S.Ct. 451. We believe that the Tenth Amendment is still alive and vital (even if not fully well), that its plain language clearly reflects the important principles of federalism upon which our government is founded, and that these principles should be considered seriously in determining whether or how far we should depart from this traditional deference.

Justice O'Conner characterized the Court's approach in *Soto-Lopez* as a "new dual analysis," observing that it had rejected "the equal protection approach the Court has previously employed in similar cases, . . . without bothering to explain why this novel use of both 'right to migrate' analysis and strict equal protection scrutiny is more appropriate, necessary or doctrinally coherent," *Soto-Lopez*, 476 U.S. 898, 919, and that even *Shapiro* had "left unclear the amount of impact on the right to travel which is necessary to give rise to . . . heightened scrutiny." *Soto-Lopez*, 476 U.S. 898, 921. Thus, the same lack of clarity in *Shapiro* was still evident 17 years later in *Soto-Lopez*.

## CONCLUSION

The inescapable conclusion is that our federal constitutional law on equal protection and state residency requirements is still unsettled, but is moving in a direction about which there is substantial and legitimate concern and disagreement.

Petitioners believe that this Court should grant review to settle the question and to exercise its supervisory powers to determine where we are, where we are going, and whether we are going in the right direction down this important constitutional road.

For the foregoing reasons, the writ of certiorari should be allowed.

Respectfully submitted,

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